

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DEBRA KIEFER TOMORSKY,

Plaintiff,

Hon. Janet T. Neff

v.

Case No. 1:09-cv-01083

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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**REPORT AND RECOMMENDATION**

This matter is before the Court on Plaintiff's Application for Attorney Fees and Costs Under the Equal Access to Justice Act. (Dkt. No.14). Plaintiff's counsel seeks \$2,850.00 in fees and costs.

Pursuant to the Equal Access to Justice Act (EAJA), the prevailing party in an action seeking judicial review of a decision of the Commissioner of Social Security may apply for an award of fees and costs incurred in bringing the action. *See* 28 U.S.C. § 2412(d)(1)(A). While a prevailing party is not simply entitled, as a matter of course, to attorney fees under the EAJA, *see United States v. 0.376 Acres of Land*, 838 F.2d 819, 825 (6th Cir. 1988), fees and costs are to be awarded unless the Court finds that the Commissioner's position was "substantially justified" or that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

The burden rests with the Commissioner to establish that her position was substantially justified, *see Secretary, United States Dep't of Labor v. Jackson County Hospital*, 2000 WL 658843 at \*3 (6th Cir., May 10, 2000), defined as "justified, both in fact and in law, to a degree

that could satisfy a reasonable person.” *Jankovich v. Bowen*, 868 F.2d 867, 869 (6th Cir. 1989). However, the fact that the Commissioner’s decision was found to be supported by less than substantial evidence does not mean that it was not substantially justified. *See Howard v. Barnhart*, 376 F.3d 551, 554 (6th Cir. 2004).

In this matter, the Commissioner has not established that the ALJ’s decision to deny Plaintiff benefits was substantially justified; Defendant has not objected to the present motion; and, finally, the Court finds that counsel’s request is reasonable and appropriate. Accordingly, the undersigned recommends that the Court grant counsel’s motion for fees and costs under the EAJA (Dkt. No. 14) in the amount of \$2,850.00.

Respectfully submitted,

Date: August 4, 2010

/s/ Ellen S. Carmody  
ELLEN S. CARMODY  
United States Magistrate Judge

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within 14 days of the date of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court’s order. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).